Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1169

ARTHUR H. KEYES AND LUCILLE KEYES, on behalf of themselves and others similarly situated,
Petitioners,

v.

THE DISTRICT OF COLUMBIA, a Municipal Corporation and WALTER E. WASHINGTON, and KENNETH BACK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the holding of the District of Columbia Court of Appeals that petitioners' failure to seek administrative relief in a timely manner, under congressional enactments having strictly local application, foreclosed their claims for tax refunds, rises to a level of importance sufficient to warrant the exercise of this Court's certiorari jurisdiction.

2. Whether the District of Columbia Court of Appeals (after invalidating the future use by respondents of different levels of assessment as unconstitutional) acted in accordance with equitable principles enunciated by this Court in declining to give its ruling retroactive effect by requiring a refund well in excess of $1 million to petitioners whose previously remitted tax monies had since been disbursed for governmental purposes.

STATEMENT

On July 19, 1973, petitioners Arthur and Lucille Keyes, Jr., on behalf of themselves and all other taxpayers similarly situated, filed suit in the Tax Division of the Superior Court of the District of Columbia for a refund of a portion of the real property taxes paid for fiscal year 1973.[1] Petitioners alleged that the property tax assessments for fiscal year 1973 for their single-family home in the District, as well as those of approximately 34,000 other single-family residence, were based on an undisclosed and unconstitutional change by respondents in their level of assessment[2] from 55% to 60% of estimated market value. They contended that notice of the 60% level of assessment was neither disclosed to them until their time for taking administrative appeals had expired nor published in accordance with the District of Columbia Administrative Procedure Act. In addition, the 60% level of assessment was not applied for fiscal year 1973 to approximately 62,378 owners of single-family residences in the District of Columbia, thus creating two separate and unequal classes of single-family taxpayers. (Pets.' App. A16 - A18.)

[1] Assessments of real property in the District of Columbia are made on a calendar year basis for the subsequent fiscal year. Fiscal year 1973 began on July 1, 1972 and ended on June 30, 1973.

[2] The level of assessment is the percentage of estimated market value upon which the District's real property tax rate was levied. All real property in the District of Columbia is now assessed at 100% of estimated market value as required by P.L. 93-407 (88 Stat. 1053; Sept. 3, 1974).

Petitioners sought a refund for themselves and all other taxpayers similarly situated which was to be measured by the difference between their tax bills for fiscal year 1973 at a level of assessment of 60%, and those same tax bills at a level of assessment of 55%. (Pets.' App. A4.)

On March 5, 1974, petitioners moved the trial court for judgment in their favor in this case on the grounds of collateral estoppel, contending that the material questions of fact and law relating to fiscal year 1973 in this case were litigated in *District of Columbia* v. *Green,* 310 A.2d 848 (D.C.App., 1973).

Respondents opposed petitioners' motion for judgment, stressing that as *Green* was a suit for injunctive relief for fiscal year 1974, the District did not in that case put into evidence testimony regarding refunds for fiscal year 1973 which it wished to present in this case.

In *Green,* the District of Columbia Court of Appeals upheld the trial court's order enjoining as unconstitutionally discriminatory the District's planned cylical reassessment program to raise the level of assessment to 60% for some 44,000 single-family residences in fiscal year 1974. In fiscal year 1973, under this program, the District revised the level of assessment for approximately 34,000 single-family residential properties from 55% to 60% (giving rise to this suit), and planned to raise the remaining residential properties to a 60% level of assessment in fiscal year 1975 to complete assessment uniformity of all single-family properties in the District of Columbia.[3] (Pets.' App. A74-A89.)

On April 24, 1974, the trial court ordered that no testimony would be taken in this case, agreeing with petitioners that, because the principle of collateral estoppel was ap-

[3] Under D.C. Code 1973, § 47-713:

> All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money.

plicable, all material questions of fact and law had already been decided against respondents in *Green*. (Pets.' App. A4-A5.)

On August 6, 1974, the trial court held that petitioners and the approximately 34,000 taxpayers situated were entitled to prompt refunds of the amounts overpaid, with corresponding interest.

In reversing, the District of Columbia Court of Appeals held that petitioners were not entitled to refunds either under the applicable statutes in force in the District of Columbia or by virtue of equitable principles. In so holding, the Court concluded that petitioners failed to make timely claims for refunds under the applicable legislative scheme. The Court further concluded that while the prospective injunctive relief granted in *Green* was warranted under the circumstances of that case, retrospective application of *Green* in a manner which required refunds of taxes and a related disbursal from the public treasury of over a million dollars previously spent for governmental purposes could not be squared with equitable principles. (Pets.' App. A2 - A15.)

Following the denial by the Court of Appeals of petitioners' motion for rehearing and for rehearing *en banc*, petitioners petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners advance no ground for review falling within the standards and considerations governing review on writ of certiorari as prescribed by Rule 19 of the Rules of this Court. And see *Fields* v. *United States*, 205 U.S. 292, 296 (1907). The instant case involves a challenge to a holding of the District of Columbia Court of Appeals that it was without subject matter jurisdiction to hear this case because petitioners and other taxpayers similarly situated failed to pursue their administrative remedies for fiscal

year 1973 as required by local law. In that connection, D.C. Code 1973, § 47-709 reads in pertinent part as follows:

> Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404; *Provided, however,* That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided. . . .

Petitioners' argument that they were unable to exhaust their administrative remedies because of concealment on the part of respondents was properly rejected by the District of Columbia Court of Appeals in its opinion as follows:

> Appellees contend that the administrative remedies could not have been pursued by any of the taxpayers for fiscal year 1973 because of prior concealment of the "stair-step" plan by District officials. In *Green*, however, we noted that three petitioners "ascertained the existence of, and raised as an issue, the increased level of assessment of their properties" before the Board of Equalization and Review for fiscal year 1974. *District of Columbia* v. *Green, supra* at 851. These taxpayers not only pursued their administrative remedies but in the process also discovered the now prohibited practice of applying different debasement factors to similarly situated taxpayers. Consequently, we cannot assume, as the trial court did in the case now before us, that a timely administra-

> tive challenge to the 1973 taxes for the purpose of obtaining refunds was unavailable or would have been fruitless. The 1973 taxpayers were just as aware as the 1974 taxpayers that their tax bills had been increased. (Pets.' App. 7.)

Under these circumstances, which involve a matter of purely local significance, absent a clear showing of egregious error, and here there is no such showing, this Court has consistently refused to exercise its jurisdiction. See *American Security and Trust Co.* v. *District of Columbia,* 224 U.S. 491 (1912); *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935); *District of Columbia* v. *Pace,* 320 U.S. 698 (1944); *United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140 (1915); *Griffin* v. *United States,* 336 U.S. 704 (1949), rehearing denied, 337 U.S. 921 (1949); *Fisher* v. *United States,* 328 U.S. 463 (1946).

Indeed, the dismissal of the present suit by the Court of Appeals because of petitioners' failure to pursue a complete and adequate remedy is in accord with prior decisions of this Court. In *Burrill* v. *Locomobile Co.,* 258 U.S. 34 (1922), this Court held that an action against the state treasurer to recover excise taxes alleged to have been unconstitutionally collected from foreign corporations was barred because of the foreign corporations' failure to petition the highest state court of Massachusetts within six months after payment of the tax as required by an exclusive state remedy. In *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337 (1937), this Court found the reasoning in *Burrill* applicable to the situation presented there and stated:

> The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. 301 U.S. 343.

Moreover, the holding of the District of Columbia Court of Appeals that the denial of refunds and the withholding of retrospective relief was equitably[4] appropriate under the circumstances presented, is in complete harmony with this Court's decisions.

Although the District's stair-step approach to achieve a uniform level of assessment as required by D.C. Code 1973, § 47-713, was held in *Green* to be impermissible in its application to certain single-family properties, the Court of Appeals recognized the salutary purpose of the stair-step program in that case as follows:

> **The facts are that until 1969 the District compiled and used a real estate assessment manual designed to achieve a debasement of 65% of value, there being no identifiable market value at that time to debase. Sales ratio studies undertaken in 1968 revealed, however, that some single-family residential properties were actually debased as low as 40%, although the desired 65% factor for multi-family and commercial properties was substantially achieved. As a result, the District developed a reassessment program to equalize single-family residential properties with other real property at a 65% level of assessment. In an effort to accomplish a common debasement factor while maintaining relative equalization within the single-family residential class a "stair-step" approach was decided upon as the means to attain the desired result over a period of time, an approach necessitated both by budgetary and manpower considerations. The debasement factor of all single-family residential properties was first raised to 55%, the next planned step being to raise the level of assessment**

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[4] Contrary to the position taken by petitioners herein, the District of Columbia Court of Appeals noted that this suit "***was brought in equity and was decided solely on equitable grounds." (Pets.' App. A5.)

> to 60% and the final goal being to elevate the debasement factor of all such properties to 65%. Thus, the level of assessment on over 33,000 single-family residential properties was raised to 60% in fiscal 1973, and an additional 44,485, those at issue in this case, had been entered on the tax rolls for fiscal 1974 at 60%. Approximately 19,000 properties remain debased at 55%. (Pets.' App. A84.)

Additionally, the exhibits attached to respondents' briefs in the trial court demonstrated a relatively equalized assessment roll for all District of Columbia single-family residential property owners in fiscal year 1973 even with the use of unequal assessment levels. And, as a result of *Green,* all real property in the District of Columbia was assessed at a single level (55%) in fiscal year 1975 by administrative order of the Director of the Department of Finance and Revenue. Furthermore, the refunds sought had already been spent for the benefit of District of Columbia residents.

Refunds to petitioners, under these circumstances, would promote financial instability, increase taxes or decrease services and be tantamount to paying taxpayers out of their own pockets. Prospective relief only, therefore, was appropriate and, in similar circumstances, has been utilized as the most equitable remedy by this Court and various state courts. In *Cipriano* v. *Houma,* 395 U.S. 701 (1969), a Louisiana law gave only "property taxpayers" the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility. While finding the challenged provisions violated the Equal Protection Clause of the Fourteenth Amendment, the Court refused to give its decision full retroactive effect, stating that:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 77 L Ed 360, 366, 53 S Ct 145, 85 ALR 254 (1932). See Chicot County Drainage Dist. v Baxter State Bank, 308 U.S. 371, 84 L Ed 329, 60 S Ct 317 (1940). Cf. Linkletter v Walker, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. 395 U.S. 706.

See also *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973).

In *Pennsylvania* v. *Williams,* 294 U.S. 176, 185 (1935), this Court emphatically stated that, where the public interest is involved:

> ***courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

Cf., Reynolds v. *Simms,* 377 U.S. 533 (1964). And see, *Weissinger* v. *Boswell,* 330 F. Supp. 615 (N.D. Ala. 1971); *Switz* v. *Middletown Twp.,* 130 A.2d 15 (N.J. 1957); *Southern Pacific Co.* v. *Cochise County,* 377 P.2d 770 (Ariz. 1963)

and *Arizona State Tax Commission* v. *Ensign*, 257 P.2d 392 (Ariz. 1953); *Johnston Businessmen's Assoc.* v. *Russillo*, 274 A.2d 433 (R.I. 1971).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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